Metropolitan Regional Council of Philadelphia and Vicinity, United Brotherhood of Carpenters and Joiners of America, AFL–CIO *and* Society Hill Towers Owners' Association *and* Nytech. Cases 4–CB–8315, 4–CC–2245, 4–CC–2250, and 4–CC–2247

August 27, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS TRUESDALE AND WALSH

On March 17, 2000, Administrative Law Judge David L. Evans issued the attached decision. The Respondent and the General Counsel filed exceptions, supporting briefs, and answering briefs. Charging Party Society Hill Towers Owners' Association filed a statement joining in the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, except as discussed below, and to adopt the recommended Order as modified and set forth in full below.[2]

The judge found that the Respondent did not violate Section 8(b)(1)(A) of the Act by videotaping and photographing the employees of Smucker Company as they crossed the Respondent's picket line to work at the Society Hill Towers condominium complex. For the reasons set forth below, we reverse the judge and find the violation.[3]

Smucker Company is a nonunion firm that was retained to perform carpentry renovations at Society Hill Towers. Soon after commencing the work in the spring of 1999,[4] the Respondent's business agent, James Dougherty, visited the office of Society Hill's general manager to complain that there should be "union people working there and that there could possibly be some problems in the future." In response to Smucker's continued presence at Society Hill, the Respondent engaged in area-standards picketing at various entrances to the condominium complex. Society Hill, in turn, set up a reserve gate system that included a separate gate for use by Smucker's employees.

Beginning on June 23 and continuing almost daily through July 7, Respondent's pickets patrolled the Smucker gate and videotaped and photographed Smucker employees as they arrived for work. On the very first day of this activity, Smucker employee Robert Majeski credibly testified that a picket videotaped him and two other Smucker employees as they approached the reserve gate. The picket followed them to the gate and continued to videotape them from the sidewalk as they walked through the Society Hill property. Shortly thereafter, these employees encountered Business Agent Dougherty near the entrance to one of the condominium towers. Dougherty took pictures of them with a still camera. When Majeski raised his hand to block the camera view, Dougherty said, "Got you, Bud."

Majeski testified about another incident on July 7. On that day, he caught Dougherty and a picket off guard when Majeski approached the Smucker gate from a different direction. Majeski and Dougherty commenced a footrace to the gate. Majeski arrived there first. After entering the gate, he looked back at Dougherty, who snapped some photographs and said, "Keep smiling, pal."

In dismissing the complaint, the judge acknowledged that the Respondent had no legitimate reason for its videotaping/photographing, but he concluded that the conduct did not violate Section 8(b)(1)(A) because Majeski did not relate that "he was, or could have been, restrained or coerced in the exercise of his Section 7 rights," and the General Counsel failed to show how the conduct in question could reasonably have restrained or coerced Smucker employees.

First, we find that the judge incorrectly relied on Majeski's subjective reactions in determining whether Section 8(b)(1)(A) had been violated. It is well settled that

[1] For the reasons set forth by the judge in sec. II,C, of his decision (fourth par.), Members Truesdale and Walsh find, contrary to the Chairman's dissenting position, that the Respondent's brief isolated 5-second picketing of the neutral gate at Society Hill Towers, especially when that gate had just been established, did not violate Sec. 8(b)(4). See also *Roofers Local 135 (Advanced Coatings & Insulation)*, 266 NLRB 321, 324–325 (1983).

[2] The judge omitted from his recommended Order a cease-and-desist provision encompassing his finding that the Respondent's business manager unlawfully threatened the Versailles apartments' property manager on July 1, 1999. We have set forth a new Order and notice which includes this remedial provision, as well as a provision addressing the 8(b)(1)(A) videotaping/photographing violation which we find below, and corrects the legal names of the two neutral employers.

The General Counsel excepts to the judge's failure to include references to neutral employer Versailles in cease-and-desist pars. 1(b) and (c) of the Order. However, as noted by the judge, those paragraphs parallel language in a 10(l) injunction issued on October 14, 1999, solely in reference to the Respondent's ongoing sound system broadcasts in violation of Sec. 8(b)(4)(ii)(B) at the Society Hill Towers. Similar unlawful activity at the Versailles had already ceased with the completion of work there by the targeted primary employer. Finally, cease-and-desist para. 1(a) of the Order appropriately enjoins the Respondent from engaging in 8(b)(4)(ii)(B) misconduct against Society Hill, the Versailles, or any other person.

[3] As set forth in his separate opinion, Member Walsh dissents on this issue.

[4] All dates are in 1999.

the appropriate test is an objective one. A finding of a violation under this test turns not on evidence that a particular employee was actually restrained or coerced by union conduct but, rather, on whether such conduct would have a reasonable tendency to restrain or coerce employees in the exercise of statutory rights. *Letter Carriers Branch 47 (U.S. Postal Service)*, 330 NLRB 667 (2000); *Teamsters Local 162 (American Steel, Inc.)*, 255 NLRB 1230, 1233 (1981).

Further, we find that the judge too narrowly construed employee rights and their protection through Section 8(b)(1)(A) by suggesting that no violation could be found because this was not a representation case and there was no hint of violence in the Respondent's actions. When the alleged unlawful conduct involves the videotaping or photographing of employees by union pickets, an 8(b)(1)(A) violation will be found when such conduct takes place in conjunction with other actions indicating that a union might react adversely to employees who cross a picket line. *Interstate Cigar Co.*, 256 NLRB 496, 500–501 (1981); *Dover Corp.*, 211 NLRB 955, 958 (1974). Proof of actual intent to coerce, although not essential to finding a violation, can be a factor supporting such a finding. *Culinary Workers Local 226 (Casino Royale, Inc.)*, 323 NLRB 148 (1997). Applying these principles here, we find the Respondent's actions unlawful.

The Respondent here does not except to the judge's finding that it had no legitimate purpose for videotaping and photographing Smucker employees. Yet it did so daily, and, in at least the two instances that Majeski testified about, it did so in a provocative and confrontational manner. The Respondent's business agent, Dougherty, who actively participated in this conduct, had previously warned Society Hill Towers management that there could be problems if nonunion labor worked at that location. Dougherty's picture-taking of Smucker employees was accompanied by derisive remarks. In one instance, he even ran to catch up to Majeski so that Dougherty could take still more pictures.[5] In addition, simultaneous with the continuous videotaping and photographing of Smucker employees as they entered the reserved gate at Society Hill Towers, the Respondent was engaged in repeated broadcast protests against Smucker's presence that reached coercive volume levels in violation of 8(b)(4)(B).[6]

Under these circumstances, we find that the Respondent's actions went beyond what the judge viewed as simple harassment. Instead, we conclude that the Respondent actually intended to intimidate the Smucker employees and to provoke their fear of retribution for working behind the picket line. See, e.g., *Culinary Workers Local 226 (Casino Royale, Inc.)*, 323 NLRB at 161 (videotaping of employee Everett). Indeed, we find such conduct would reasonably tend to restrain and coerce employees in the exercise of Section 7 rights. The Respondent thereby violated Section 8(b)(1)(A).[7]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Metropolitan Regional Council of Philadelphia and Vicinity, United Brotherhood of Carpenters and Joiners of America, AFL–CIO, its officers, agents, and representatives shall

1. Cease and desist from

[5] We disagree with our dissenting colleague's claim that the Respondent's picture-taking was "unaccompanied by statements, gestures, or other conduct that explicitly suggested that there would be retribution for not honoring the picket line." Here, the Respondent systematically took pictures of the two to four nonunion Smucker employee work force, not only as they entered the jobsite gate, but continuing on in various jobsite locations, and including closeup photos. In the course of this continuous picture-taking, when Smucker employees sought to shield themselves from the picture-taking or elude the pursuing Respondent photographers, they were taunted with the comments "Got you, Bud," and "Keep smiling," while the Respondent continued to pursue them and take their pictures. Unlike the dissent, we find that these statements and conduct, considered in conjunction with the Respondent's other unlawful conduct, reasonably would tend to restrain and coerce the Smucker employees Sec. 7 rights.

[6] Although our dissenting colleague pays lip service to the principle that the Board is to examine all of the circumstances when determining whether alleged conduct reasonably interferes with employee Sec. 7 rights, he fails to apply it. Instead, he attempts to artificially segregate into discrete acts the Respondent's repeated, intrusive photography and videotaping of employees exercising their statutory right to work nonunion (for which the Respondent had no legitimate purpose), from the accompanying intimidating conduct, and coterminous 8(b)(4)(B) conduct. We would not do so. Further, we reject our colleague's claim that there is no connection between the Respondent's use of the sound system at excessive levels and the picture-taking activity. Where, as here, those broadcasts were for the purpose of forcing Society Hill to cease doing business with Smucker (and following a Respondent threat that there would be trouble if jobsite work was performed nonunion), there is a very obvious connection to the persistent and coercive photographing of the Smucker employees.

[7] For the foregoing reasons, Chairman Hurtgen agrees that the Respondent violated Sec. 8(b)(1)(A) by photographing and videotaping nonunion Smucker employees as they crossed the Respondent's picket line. Further for the reasons stated in his dissenting opinions in *Randell Warehouse of Arizona*, 328 NLRB 1034 (1999), and *Teamsters Local 299 (Overnite Transportation Co.)*, 328 NLRB 1231 (1999), Chairman Hurtgen finds that the videotaping and photographing of those employees additionally violated Sec. 8(b)(1)(A) because the Respondent took pictures of the employees while they were engaged in Sec. 7 activities without offering those employees a benign explanation for that conduct. In these circumstances, Chairman Hurtgen finds that the employees reasonably would fear that the Respondent was making a permanent record of their images, for purposes of future retribution.

(a) Threatening, coercing or restraining Society Hill Towers Owners' Association, the Versailles Affiliates, or any other person by using a sound system at excessive volume levels where an object of such conduct is to force or require such persons to cease doing business with Smucker Company or Nytech.

(b) Using a sound system or other amplification method to broadcast its message or any other material or sound at the Society Hill Towers complex at volume levels which exceed the limits specified in section V(B) of the "Noise and Excessive Vibration Regulations" of the Philadelphia Department of Public Health, Board of Health, where an object of such conduct is to force or require Society Hill Towers Owners' Association to cease doing business with Smucker Company.

(c) Using a sound system or other amplification method at or in the immediate vicinity of the Society Hill Towers complex between the hours of 9 p.m. and 7 a.m. on weekdays, or between the hours of 4 p.m. and 11 a.m. on Saturdays or Sundays, where an object of such conduct is to force or require Society Hill Towers Owners' Association to cease doing business with Smucker Company.

(d) Threatening, coercing, or restraining The Versailles Affiliates or any other person by warning against the employment of nonunion labor where an object of such warning is to force or require The Versailles Affiliates or any other person to cease doing business with Smucker Company.

(e) Videotaping and photographing employees of Smucker Company in a manner that would cause them to fear retribution for crossing its picket line.

(f) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its business offices and at its meeting halls in Philadelphia, Pennsylvania, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Within 14 days after service by the Region, sign and return to the Regional Director sufficient copies of the notice for posting by Smucker Company, Nytech, Society Hill Towers Owners' Association, and The Versailles Affiliates, if they are willing, at all places where their notices to the public and patrons customarily are posted.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER WALSH, dissenting in part.

Contrary to the majority, I agree with the judge that the Respondent did not violate Section 8(b)(1)(A) of the Act by videotaping and photographing the employees of Smucker Company (the primary employer) as they crossed the Respondent's picket line. As the judge recognized, the General Counsel simply failed to meet his burden of proving that the picture-taking activity would reasonably tend to restrain or coerce employees in the exercise of their statutory rights.

Where union videotaping or photographing is alleged to violate Section 8(b)(1)(A), the Board has not employed a per se rule, but instead has used an "all the circumstances" approach. "[T]he photographing of employees by pickets . . . is not by itself violative of Section 8(b)(1)(A) of the Act. It is only when such conduct takes place in conjunction with other actions indicating that a union might react adversely to employees who [do not] honor a picket line that such conduct exceeds the bounds of permissible action." *Interstate Cigar Co*., 256 NLRB 496, 500–501 (1981). Accord: *Culinary Workers Local 226 (Casino Royale, Inc.)*, 323 NLRB 148, 161 (1997) (videotaping accompanied by threats of bodily harm); *Auto Workers Local 695 (T.B. Wood's Sons Co*.), 311 NLRB 1328, 1336 (1993) (videotaping accompanied by numerous threats and physical assaults).

Here, the judge carefully canvassed the record and correctly concluded that "no . . . possible element of restraint or coercion [was] present." The Union's picture-taking was unaccompanied by statements, gestures, or other conduct that explicitly or implicitly suggested that there would be retribution for not honoring the picket line. As the judge stated, "there is no hint of violence toward the Smucker employees in any of the Respondent's conduct."

In attempting to justify their reversal of the judge's decision, my colleagues grasp at straws. They state that the

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

Respondent had no valid reason for the picture-taking, but under Board law it had no obligation to supply one. They cite to two "derisive remarks" the Respondent's business agent made while taking an employee's picture, but surely the Respondent does not coerce or restrain simply because it mildly ridicules those who would cross its picket line. While no doubt irritating, the comments in question ("Got you, Bud," and "Keep smiling, pal") simply do not rise to the level of restraint or coercion.

Nor do the Respondent's violations of Section 8(b)(4)(ii)(B) supply the necessary element of employee restraint or coercion. The threat of "trouble" directed to the property manager of a neutral is not alleged or found to be a violation of Section 8(b)(1)(A), and apparently was not disseminated to the Smucker employees. The Respondent's use of a sound system at excessive volume levels is alleged and found to be unlawful because such conduct had an object of forcing or requiring neutrals to cease doing business with nonunion contractors. The sound broadcasts were in no way linked to the picture-taking activity and were not even directed against the Smucker employees. It is far fetched, to say the least, to suggest, as my colleagues do, that the noise level of these broadcasts would somehow "intimidate the Smucker employees" and "provoke their fear of retribution for working behind the picket line."

Accordingly, for all these reasons, I would affirm the judge's dismissal of the 8(b)(1)(A) allegations of the complaint.

MEMBER HURTGEN, dissenting in part.

Contrary to my colleagues, I find merit in the General Counsel's exceptions (joined in by the Charging Party) that the Respondent violated Section 8(b)(4)(i) and (ii)(B) by picketing a neutral gate at the Society Hill complex on June 23, 1999.

The judge found that, after the Respondent commenced picketing the complex of the Society Hill Towers Owners' Association, that Association (a neutral) notified the Respondent on June 21, in writing, that it was establishing a reserved gate at the complex loading dock beginning at 12:01 a.m. on June 23. The letter stated that the Association, at that time, would post the two complex entrances with signs indicating that the loading dock entrance was reserved for primary Smucker employees and suppliers, and the parking garage entrance was reserved for all others. The Association established the two gates, consistent with this notice. There is no allegation that the integrity of the gates was ever compromised.

At 7 a.m. on June 23, a Respondent picket, wearing a placard, and a second individual, carrying a video camera, stood in the parking garage driveway in front of a person employed by the Association as she was attempting to drive in. After about 5 seconds, the picket and camera-bearing individual moved, permitting the employee to enter the garage.

Although the judge found this June 23 conduct constituted picketing by the Respondent of the neutral gate, the judge nonetheless recommended dismissing this 8(b)(4)(B) allegation on the bases that the incident was brief, isolated, and occurred shortly after the reserved gate had been established. I disagree.

First, the brevity of the proscribed conduct does not render it lawful. It merely raises the issue of whether the conduct is of such a nature that, notwithstanding its illegality, it would not effectuate the purposes of the Act to find the violation. Relevant to such a determination is the context in which the violation occurred. Here, at the time the reserved gate was breached on June 23, the Respondent was already violating Section 8(b)(4)(ii)(B)—at the same location—by repeated, amplified broadcasts which rose to a "level that reasonably causes a[n] individual who is neutral to that dispute to substantially alter his conduct against his will,"[1] and had the unlawful secondary object of forcing the Association to cease doing business with Smucker. Where, as here, a respondent union engages in a series of 8(b)(4)(B) violations, I would not effectively drop one of them simply because it is brief in duration. Further, the June 23 reserved gate violation occurred while the Respondent was concurrently restraining and coercing employees by photographing and videotaping them. In these circumstances, I find that the judge erred by considering the reserved gate violation in isolation, and in recommending its dismissal as "de minimus."

Accordingly, I find that the Respondent violated Section 8(b)(4)(i) and (ii)(B) by its June 23 picketing at the reserved gate.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten, coerce, or restrain Society Hill Towers Owners' Association, The Versailles Affiliates, or any other person by using a sound system at excessive volume levels where an object of such conduct is

[1] See sec. II,C, of the judge's decision, the penultimate paragraph.

to force or require such persons to cease doing business with Smucker Company or Nytech.

WE WILL NOT use a sound system or other amplification method to broadcast our message or any other material or sound at the Society Hill Towers complex at volume levels which exceed the limits specified in section V(B) of the "Noise and Excessive Vibration Regulations" of the Philadelphia Department of Public Health, Board of Health, where an object of such conduct is to force or require Society Hill Towers Owners' Association to cease doing business with Smucker Company.

WE WILL NOT use a sound system or other amplification method at or in the immediate vicinity of the Society Hill Towers complex between the hours of 9 p.m. and 7 a.m. on weekdays, or between the hours of 4 p.m. and 11 a.m. on Saturdays or Sundays, where an object of such conduct is to force or require Society Hill Towers Owners' Association to cease doing business with Smucker Company.

WE WILL NOT threaten, coerce, or restrain The Versailles Affiliates or any other person by warning against the employment of nonunion labor where an object of such warning is to force or require The Versailles Affiliates or any other person to cease doing business with Smucker Company.

WE WILL NOT videotape and photograph employees of Smucker Company in a manner that would cause them to fear retribution for crossing our picket line.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

METROPOLITAN REGIONAL COUNCIL OF PHILADELPHIA AND VICINITY, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL–CIO

Lea F. Alvo-Sadiky, Esq., for the General Counsel.
Richard C. McNeill Jr., Esq., of Philadelphia, Pennsylvania, for the Respondent.
Dooreen S. Davis, Esq., of Philadelphia, Pennsylvania, for Charging Party, Society Hill Towers' Owners' Association.

DECISION

STATEMENT OF THE CASE

DAVID L. EVANS, Administrative Law Judge. This matter under the National Labor Relations Act (the Act) was tried before me in Philadelphia, Pennsylvania, on November 2–3, 1999.[1] Society Hill Towers Owners' Association (Charging Party Society Hill Towers), filed the charges in Cases 4–CC–2245, 4–CB–8315, and 4–CC–2250 against Metropolitan Regional Council of Philadelphia and Vicinity, United Brotherhood of Carpenters and Joiners of America, AFL–CIO (the Respondent), on June 23 and 24 and August 11, respectively. Nytech filed the charge in Case 4–CC–2247 against the Respondent on July 15. Based on those charges the General Counsel issued a complaint on September 14 alleging that the Respondent had violated Section 8(b)(1)(A) and Section 8(b)(4)(i) and (ii) (B) by various acts and conduct. The Respondent duly filed an answer admitting that this matter is properly before the National Labor Relations Board (the Board) but denying the commission of any unfair labor practices.

Upon the testimony and exhibits entered at trial,[2] and upon my observations of the demeanor of the witnesses,[3] and after consideration of the briefs that have been filed, I make the following findings of fact and conclusions of law.

I. JURISDICTION

As the Respondent admits, Society Hill Towers Owners' Association is a Pennsylvania corporation located in Philadelphia where it is engaged in the business of managing, maintaining, and operating a condominium complex (Society Hill Towers). In conducting said business, Society Hill Towers annually receives gross revenues in excess of $500,000, and it purchases and receives goods valued in excess of $5000 directly from suppliers located at points outside Pennsylvania.

As the Respondent further admits, Smucker Company (Smucker) is a Pennsylvania corporation with an office located in Smoketown, Pennsylvania, where it is engaged in business as an interior finishing contractor. In conducting the business, Smucker annually purchases and receives goods valued in excess of $50,000 directly from suppliers located at points outside Pennsylvania.

As the Respondent further admits, Versailles Affiliates is a Pennsylvania limited partnership that is located in Philadelphia where it is engaged in the business of managing, maintaining, operating, and leasing residential and commercial apartments in a building (The Versailles). In conducting said business, The Versailles annually receives gross revenues in excess of $500,000, and it purchases and receives goods valued in excess of $5000 directly from suppliers located at points outside Pennsylvania.

As the Respondent further admits, Nytech is a New York corporation with an office and place of business located in Long Island City, New York, where it is engaged in the business of installing windows. In conducting business, Nytech annually performs services valued in excess of $50,000 outside New York.

[1] All dates are in 1999 unless otherwise indicated.

[2] Certain passages of the transcript have been electronically reproduced. Some corrections to punctuation have been entered. Where I quote a witness who restarts an answer, *and that re-starting is meaningless*, I sometimes eliminate redundant words; e.g., "Doe said, he mentioned that . . . ." becomes "Doe mentioned that . . ." In my quotations of the exhibits, I sometimes simply correct *meaningless* grammatical errors rather than use "(sic)." The General Counsel's unopposed motion to correct the transcript at various points is granted.

[3] Credibility resolutions are based on the demeanor of the witnesses and any other factors that I may mention.

At all material times, therefore, Society Hill Towers, Smucker, Nytech and The Versailles have been, and are, employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. As the Respondent further admits, it is a labor organization within Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Overview and Contentions

The Society Hill Towers complex is located in downtown Philadelphia. The complex is irregularly shaped, but it is fair to say that it covers approximately a 2-block by 3-block area, and there is a large courtyard-type of open area in the middle. The residential portion of the complex consists of three buildings; each building is 31 stories high, and there are up to 8 condominiums on each residential story; there is a total of 700 condominiums. A fourth building in the complex houses the Society Hill Towers' offices, a grocery store, a travel agency, and some other retail establishments. As well as being surrounded by Philadelphia public streets, a public "walkway" also runs through the complex's courtyard.

In August 1998, Society Hill Towers contracted with Smucker to provide carpentry renovations for all 90 hallways of the condominium areas. The projected completion date is in April 2000. Smucker has used from four to five employees at a time while working on this project. Beverly Sherman is the general manager of the Society Hill Towers' property. Edward Coryell and James Dougherty are the Respondent's business manager and business agent, respectively. The Respondent admits that Coryell and Dougherty are its agents within Section 2(13) of the Act.

Sherman testified that during the spring of 1999 Coryell and Dougherty visited her at Society Hill Towers' office. Dougherty told her that Society Hill Towers was "destroying area wages by employing nonunion employees" and that she should "have union people working there and that there could possibly be some problems in the future." Sherman told Coryell and Dougherty that she did not make those decisions herself and needed to consult with Society Hill Towers' board of directors. Coryell and Dougherty replied that they could not "promise anything," and they left. Coryell did not testify; Dougherty did testify, but he did not dispute this testimony by Sherman.

There are two vehicle entrances to the Society Hill Towers complex, and they are located on opposite sides of the complex. One of the entrances is to an underground parking garage; the other is at a loading-dock area.[4] On June 21 and 22, the Respondent conducted area-standards picketing of both vehicle entrances. On June 23, Society Hill Towers posted signs at its loading-dock entrance to indicate that it was to be used only by employees and suppliers of Smucker (the Smucker entrance or gate). At the same time, Society Hill Towers posted signs at its parking-garage entrance to indicate that it was to be used by employees and suppliers of all other employers and by all residents (the neutral entrance or gate). Except for one occasion, there is no contention that the Respondent conducted picketing of the neutral gate after Society Hill Towers established its separate gate system.

The complaint alleges that the Respondent, at the Society Hill Towers complex, in furtherance of "a protest concerning the performance of work by Smucker's employees": (1) from June 23, until on or about July 7, in violation of Section 8(b)(1)(A), videotaped and photographed Smucker's employees; (2) on June 23, in violation of Section 8(b)(4)(i) and (ii)(B), picketed the neutral gate; and (3) on 48 specific dates from June 15 through October 7, in violation of Section 8(b)(4) and (ii)(B), "used a sound system to broadcast its protest message at excessive noise levels." The complaint alleges that the Respondent's photographing and videotaping of Smucker's employees violated Section 8(b)(1)(A) because it restrained and coerced those employees in the exercise of their rights under Section 7 of the Act.[5] The complaint alleges that the Respondent's picketing of the neutral gate on June 23 violated Section 8(b)(4)(i) and (ii)(B), and that its use of the sound system at excessive volume levels at the other times violated Section 8(b)(4)(ii)(B), because all of such conduct had an object of forcing or requiring Society Hill Towers to cease doing business with Smucker.[6]

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[4] Actually, no witness referred to the second entrance as being in a loading-dock area, but photographs of the entrance show that it is, and that is a convenient way of referring to its placement without going into an otherwise unnecessary description of how the Philadelphia streets surround the irregularly shaped area involved.

[5] Sec. 7 provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities.

Sec. 8(b)(1)(A) provides:

> It shall be an unfair labor practice for a labor organization or its agents (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in [Section 7] of this title . . . .

[6] Sec. 8(b)(4)(i) and (ii)(B) provides that it is an unfair labor practice for a labor organization or its agents:

> (4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
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> . . . .
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . .
>
> *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution . . . .

In its answer, the Respondent denies that its protest at the complex "concerned the performance of work by Smucker's employees," and it affirmatively alleges that its dispute only concerns "the destruction of area wage standards by Smucker on the project." The Respondent admits that it engaged in some videotaping and photographing of Smucker's employees at the complex, but alleges that it did so only "to record taints of the neutral gate established at the Towers Complex." The Respondent further admits that it used a sound system "on numerous occasions" to broadcast its area standards message, but it denies that it did so at "excessive noise levels." The Respondent further contends that, even if its amplified broadcasts could, in some sense, be considered to have been at excessive volume levels, its message was nevertheless speech that is protected by the First Amendment to the United States Constitution and Section 8(c) of the Act.[7]

The Versailles, also located in downtown Philadelphia, has 104 apartments that are mostly occupied by residential tenants. The Versailles is jointly owned and operated by Carlisle Construction Company and Rittenhouse Regency Affiliates. At some point in early 1999, The Versailles contracted with Charging Party Nytech to remove old windows and install new ones. The work began about June 29, and it was completed in late July. About 14 employees of Nytech performed the work. Jeffrey Davidson is the property manager for The Versailles. Davidson testified that at some point after Nytech's work began at The Versailles, he received a telephone call from Dougherty. According to Davidson:

> He told me that he knew we had a project going there and that we weren't using his men, and he said that if we didn't use his men there, that he would have 100 of his men show up at the job and there might be trouble. . . .
>
> I explained to him that we had a contract with Nytech and that they hired the people that do the work there, and there was really nothing I could do about that. So he also said that I shouldn't be surprised if people showed up at our other property as well. I suggested that would not be a good idea since we didn't have any work going on there, but that pretty much was the end of the conversation at that point.

The complaint alleges that Dougherty's statements to Davidson, which Dougherty did not deny when he testified, constituted a threat within Section 8(b)(4)(ii)(B). The complaint further alleges that, also in violation of Section 8(b)(4)(ii)(B), the Respondent, from on or about July 6 until July 16, "used a sound system at excessive noise levels" at The Versailles. The complaint alleges that Dougherty's threat to Davidson, and the Respondent's use of the sound system at excessive volume levels at The Versailles, violated Section 8(b)(4)(ii)(B) because all of such conduct had an object of requiring The Versailles to cease doing business with Nytech. The Respondent enters the same defenses for its use of the sound system at The Versailles as it does for its use of the sound system at Society Hill Towers.

On October 14, upon a petition filed by the General Counsel in the United States District Court for the Eastern District of Pennsylvania under Section 10(l) of the Act, Senior Judge John P. Fullam issued a memorandum and order finding that, upon the evidence that had been presented in a hearing before him, there was reasonable cause to believe that the Respondent had violated Section 8(b)(4)(ii)(B) by conducting amplified broadcasts at Society Hill Towers at "vastly excessive noise levels." Pending the instant unfair labor practice proceedings before the Board, Judge Fullam enjoined the Respondent from:

> 1. Using a sound system or other amplification method to broadcast its message or any other material or sound at the Towers Complex at noise levels which exceed the limits specified in Section V(B) of the "Noise and Excessive Vibration Regulations," of the Philadelphia Department of Public Health, Board of Health.
>
> 2. Using a sound system or other amplification method at or in the immediate vicinity of the Towers Complex between the hours of 9 p.m. and 7 a.m. on weekdays, or between the hours of 4 p.m. and 11 a.m. on Saturdays or Sundays.

(Between 9 p.m. and 7 a.m., 7 days per week, is the period covered by the Philadelphia noise ordinances that regulate devices such as sound trucks.) Following Judge Fullam's order, the Respondent has continued to conduct amplified broadcasts at the Society Hill Towers complex, but the General Counsel does not contend that by any of such subsequent broadcasts the Respondent violated Sec. 8(b)(4)(ii)(B).

B. The Evidence

In addition to the undisputed evidence of Coryell's and Dougherty's statements to Sherman at Society Hill Towers, and in addition to the undisputed evidence of Dougherty's statements to Davidson at The Versailles, the General Counsel introduced the following evidence, only a part of which the Respondent disputes.

1. The Respondent's conduct at the Society Hill Towers complex

a. Broadcasting at Society Hill Towers

The complaint alleges, and it is not disputed, that the Respondent conducted amplified broadcasts at the Society Hill Towers complex on the following 48 dates: June 15, 19, 25, 27, 28 and 30; July 7, 12, 13, 21, 22, 26, 27, and 29; August 2, 4–7, 9–12, 16, 18, 25, 26, and 30; September 1, 3, 5, 7, 9, 12, 14, 19, 21, 22, 24–26, and 28–30; and October 2, 4, 6, and 7. Of these

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The quoted proviso of Sec. 8(b)(4) is commonly known as its "publicity proviso."

[7] The First Amendment is:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Sec. 8(c) provides:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

dates, June 19 and 27, August 7, September 5, 12, 19, 25, and 26, and October 2, were weekend days when most residents could reasonably have been expected to attempt to sleep later than on weekdays.[8]

Sherman testified that, before the October 14 District Court injunction, the Respondent used portable sound systems to broadcast a recorded message from sidewalks of public streets that bordered the complex. The broadcasts usually began about 7 a.m. and 7 p.m., but sometimes they began during mid-day. The broadcasts lasted for periods of 45 minutes to 2 hours. The message was about 45 seconds in length, and it was on an audiotape loop so that it was repeated continually. The text of the message, most of which was also contained on handbills that the Respondent simultaneously distributed to passers-by, was:

> This is an appeal to the general public. Society Hill Towers engages a building contractor who destroys area building trade wages and benefits. Their contractor, Smucker, uses low-wage workers, imported from Lancaster County, who are paid substantially less than the prevailing building trades wages and benefits. Society Hill Towers and Smucker reap large profits at the expense of an underpaid workforce. Express your concern to Society Hill Towers. Call Beverly Sherman at [telephone number] and tell her you disagree with their construction policy. Metropolitan Regional Council of Carpenters thanks you for your support.

(The handbill further stated, but the taped loop did not: "We are not asking anyone to cease work or deliveries.") Further according to Sherman, the Respondent sometimes used two or three sound systems. When multiple sound systems were used, their starting times were not synchronized, so the text of the message was unintelligible.

Sherman, who lives in a 6th floor condominium of the complex, testified that during the summer, even when the central air-conditioning was on and her windows were closed:

> On occasions, I've seen it set off a car alarm. It's the equivalent of going into a room and turning your volume all the way up with the door closed and nothing but the sound and you in the room. It's as loud as the fire emergency system that we have that goes off throughout the building when there's a fire [-alarm testing].

Sherman testified that the broadcasts were conducted at such volume, "[a]lmost always" before the October 14 injunction was issued.

The parties stipulated that the Civil Affairs Division of the Philadelphia Police Department (the Civil Affairs Division) is assigned to handle, among other things, confrontations during labor disputes. The parties further stipulated that the Air Management Division of the Philadelphia's Department of Health (the Air Management Division) is charged with the duty of enforcing the City's noise ordinances and regulations.

Sherman testified that she has received "hundreds" of complaints from the residents of Society Hill Towers about the volume of the Respondent's broadcasts. In an effort to get the Respondent to turn down the volume of the sound systems, she called the Civil Affairs Division and the Air Management Division, "every time." Sherman was asked and she testified:

> Q. What has happened as a result of your contact with Civil Affairs?
>
> A. On some occasions, they asked the Carpenters to lower it, and on some occasions, they will. On other occasions, they ask them to lower it, but the Carpenters won't. And on some occasions, they don't ask them to lower it.
>
> Q. How many times have you called Air Management?
>
> A. Almost every time.
>
> Q. And what has happened as a result of that?
>
> A. Usually, they take about a half hour to 45 minutes before they get there, from the time I call. When the Carpenters Union sees the truck in the vicinity, they will automatically lower it before the [City] representative gets to the site.
>
> Sometimes the Carpenters Union has young boys with radio walkie-talkies who let them know when Air Management is in the vicinity; so it's a mixed bag.

Other witnesses also testified to the practice of the Respondent's agents' signaling the operators of the sound systems when marked patrol cars (or trucks) of the Air Management Division or the Civil Affairs Division approached the area. Most often, the signaling was done by a lookout's standing in a part of the complex where the sound systems' operators could see them; the lookouts would raise, and cross, their arms whenever a City vehicle approached the area. When such signals were given, the operators of the sound systems would lower the volume of the broadcasts, or they would terminate the broadcasts altogether. This testimony went undenied, and it was credible.

J. Otis Smith, who lives in an 18th floor condominium of the complex, testified consistently with Sherman about the days and hours that the Respondent conducted its broadcasts; he further corroborated Sherman's testimony that, when the Respondent used multiple speakers, the texts of the broadcasts were unintelligible. Smith testified that he operates a business from his condominium and that the Respondent's broadcasts were so loud that he had difficulty talking on the telephone; he adopted the practice of getting his correspondents off the telephone as soon as he could and calling them back when the broadcasts ceased. When asked to describe how loud the broadcasts were in July and August, Smith replied:

> [I]t would be as though I had turned up a radio in my office while I was trying to work, to the top of its sound; so that's how loud it is coming in. It's that loud. You can't concentrate when that sound is at its loudest. The way it was playing during those months.

Smith further testified that when the broadcasts started at 7 a.m. on Saturdays and Sundays, "that's not when I was planning to get up," and they awakened him. Smith further testified that he called the Society Hill Towers office to complain about the

[8] On brief, the General Counsel notes that the Charging Party notified the Respondent on June 21 that Smucker would be present only on weekdays, but the General Counsel does not argue that the Respondent's weekend broadcasting violated Sec. 8(b)(4)(ii)(B) solely because it was conducted when employees of Smucker were then temporarily absent.

noise and, on some occasions in July and August, he called the Civil Affairs Division to complain about the broadcasts. On cross-examination, Smith testified that, since the 10(l) injunction was granted, he can still hear the broadcasts from his condominium, but they are not so loud as to disrupt his conduct of business over the telephone.

Evelyn Feldman, who lives in a 25th floor condominium of the complex, testified that, beginning in May, the broadcasts by the Respondent's were loud enough to wake her on weekends when she tried to sleep after 7 a.m. Feldman further testified that, when the broadcasts were conducted during the day, they would wake her 84-year-old husband who is in frail health. Sometimes Feldman called the Society Hill Towers office to complain, and sometimes she went directly to the operators of the sound systems to ask them to turn down the volume. Feldman testified that, sometimes when she went to the sound system operators, they would turn it down "momentarily," but, "it would be up again in short order."

James Timberlake, who lives in a 31st floor condominium of the complex, testified consistently with Sherman about the times that the Respondent's broadcasts were made in July and August, and he testified that the weekend broadcasts would awaken him and his wife and that the broadcasts would waken their infant son on other days, as well. Timberlake further testified that, on at least one occasion, he and his wife went to the (street-level) pool area of the complex and the sound system was so loud that they could not carry on a conversation and were required to leave. Timberlake testified that, on occasion, he would call the Air Management Division; when their agents got to the area, the Respondent would turn down the volume of the broadcasts. Timberlake also testified to complaining to the Society Hill Towers office about the noise levels of the Respondent's broadcasts.

Cynthia Adams is not a resident of the Society Hill Towers complex. Adams owns a townhouse immediately across a street from the complex, and, starting in May, the Respondent set up one of its sound systems on the sidewalk immediately outside her home. Adams testified that, even though the Respondent pointed the speakers away from her house and toward the Society Hill Towers complex, the broadcasts were so loud that they interfered with her attempts to conduct business on her home telephone. Adams testified specifically that on August 28, the volume shook the pictures that were hanging on her walls and awakened her daughter whom she had just brought home from surgery at a hospital. Adams testified that on that occasion she went to Dougherty and asked him to lower the volume; Dougherty said he would do so, and went through the motions of doing so, but the volume was not perceptively lowered.

Willie Terrill is a noise pollution inspector for the Air Management Division. Terrill testified that, before the October 14 10(l) injunction was issued, he was called to the Society Hill Towers complex "probably 50" times in response to citizens' complaints about the volume of the Respondent's broadcasts in the area.[9] Terrill always arrived in a well-marked Philadelphia vehicle, and he testified that, when he approached the area, "spotters" used by the Respondent usually signaled the operators of the sound systems so that it was difficult to get meaningful readings from sound meters that he uses in his work. Terrill estimated that, "75 or 80 percent" of the approximately 50 times he responded to citizens' complaints about the volume of the Respondent's broadcasts at the Society Hill Towers complex, he was able to get in position to hear the broadcasts before he was spotted. Terrill testified that on some such occasions, he could hear the broadcasts from as much as 5 blocks away.

On only two occasions was Terrill able to obtain readings of the volumes of Respondent's broadcasts at Society Hill Towers and compare them to the ambient background noise. One of the occasions was on July 22 when he stationed himself in the rear of Adams' property well before the morning's broadcast started. The other occasion was on August 9 when he stationed himself in Sherman's condominium well before the evening's broadcast started. Terrill testified that on both occasions his sound-measuring equipment indicated that the volumes of the broadcasts were in excess of that which is allowed above background noises by the Philadelphia ordinances. On both occasions Terrill issued civil citations to Dougherty. The Respondent has appealed both citations, and the determinations of the Respondent's alleged violations of the City code on July 22 and August 9 are not final. (The parties stipulated that another City inspector issued a noise-violation citation to the Respondent on September 12; the issuance of that citation is also being appealed by the Respondent.)

Lt. Anthony McLaughlin, who is the supervisor of the Civil Affairs Division's "Labor Squadron," testified that his department had received a great number of citizens' complaints about the volume of the Respondent's broadcasts at the Society Hill Towers complex, but his only testimony about what he heard at the scene was that, on July 16, it was "a noise to our conversation," and that it was "unreasonable." McLaughlin also testified, however, that on October 7 he could hear the broadcasts from 2 blocks away from the Society Hill Towers complex.

Officer Edward Gleason of the Civil Affairs Division testified that on June 15, he went to the scene; the sound systems were not turned on until some time after he got there. When Dougherty did turn it on:

> It was uncomfortable to be standing anywhere in front of the sound system. To have a conversation with Mr. Dougherty, you had to walk behind the speaker. It's a directional cone-shaped speaker and it was pointed at the buildings. If you were anywhere in the vicinity in front of it, you couldn't hold a normal conversation. You would have to shout and walk around behind it where the volume wasn't as loud.

Gleason further testified that on August 2 the Respondent operated its sound systems at the complex. Gleason was asked and he testified:

> Q. Were the two speakers playing simultaneously?
>
> A. Well, sort of. They were both going at the same time, but they were playing the same message. They were just out of—they weren't synchronized. They were a little bit off.
>
> Q. Could you understand the message?

[9] The transcript, p. 161, L. 10, is corrected to change "I wouldn't approve the litany," to "it wouldn't prove the allegations."

A. Not real well. If you stood close to one or the other, you could understand the message. . . .

Q. Okay. Can you describe the sound, how loud the sound was? . . . .

A. Yeah; if I was in the area of the courtyard of the building[s], and I was at different points, talking to people, you really had to raise your voice to be heard. You couldn't be heard in a normal speaking voice.

Gleason testified that he asked Dougherty to lower the volume; Dougherty went through the motions of lowering the volume, but "[n]ot really appreciably. You couldn't tell that it was lowered much at all."

Gleason testified that on August 25 he was again called to the scene; he could hear 2 sound systems that were operating from inside his vehicle from a block away; the systems again were not synchronized. Gleason testified that Dougherty was operating the sound systems at volumes, "[i]dentical to the other occasions that I spoke to him." Gleason asked Dougherty to lower the volume, but Dougherty refused.

Gleason further testified that on September 14, Dougherty was operating 2 sound systems, about a block away from each other, without their being synchronized. One of the 2 systems was so loud that Gleason could not hear the other until he walked immediately to it. Gleason asked Dougherty to lower the volume of both systems. Dougherty went to the systems and reported back to Gleason that he had done so, but Gleason could tell no difference.

Officer Donald West of the Civil Affairs Division testified that he went to the complex on July 12 and 13. During both days, according to West, the volume of the Respondent's sound systems was so high that "if you're standing next to someone in the area where the speaker is, you can't hear the conversation that you're having with that person." On both days West asked Dougherty to lower the volume, but Dougherty refused. West further testified that on September 22 he went to the scene where Dougherty was operating 2 sound systems without their being synchronized; West again asked Dougherty to turn the volume down, but Dougherty refused. West was not, however, asked to describe the volume of the Respondent's broadcast on September 22.[10]

The Respondent does not dispute any of the above testimony.

(On brief, the General Counsel and the Charging Party Society Hill Towers argue that I erred in receiving a multiplicity of written police reports only for the purpose of demonstrating the dates and times that police came to the scene pursuant to citizens' complaints, a purpose for which the Respondent did not object. The General Counsel and the Charging Party argue that the police reports were admissible, in full, under the public records hearsay exception of Fed.R.Evid. 803(8). Even if arguably so, the reports were objectionable if they contained no probative evidence on any issue before me. The Charging Party does not refer to any particular police report that is in evidence; the General Counsel does, but only to say that: "The August 5 report notes that the sound was very loud." Such conclusions are probative of nothing, and the reports that contained them were therefore objectionable under Fed.R.Evid. 403 because their admission would have only resulted in a "waste of time." This assessment is fully demonstrated by the fact that, although the General Counsel took the effort to compile an appendix that displays the dates and times of all police reports, she certainly did not "waste" any time quoting, or even summarizing, any police report except that of August 5.)

b. Picketing of the neutral gate at Society Hill Towers

On June 21 and 22 the Respondent's agents carried picket signs at the entrance to the underground garage of the Society Hill Towers complex. The precise wording of the signs is not in evidence, but it is not disputed that the signs constituted publicity that Smucker was not paying its employees according to the Respondent's concept of the area standards. By letter dated June 21, Society Hill Towers notified the Respondent that, as of 12:01 a.m. on June 23, the entrance at the loading-dock area would posted for the exclusive use of employees and suppliers of Smucker and that the entrance to the underground parking garage would be posted for the exclusive use of employees and suppliers of all other employers. It is undisputed that the Respondent received this letter on June 22. It is further undisputed that Society Hill Towers did establish the separate gates in accordance with its June 21 letter. (The posting at the underground parking garage also indicated that it was to be used by residents of the complex.)

Christen Definis is an administrative assistant to Beverly Sherman (again, the general manager of the Society Hill Towers complex). Definis testified that about 7:10 a.m. on June 23 she arrived at work by automobile at the neutral gate at the parking garage entrance. Definis testified that, as she attempted to enter the garage, two men stood in the driveway, in her way, for "[a]bout 5 seconds." One of the men was wearing a sign; the other was not wearing a sign, but he was holding (although not using) a video camera. Definis did not know who either of the men were, but she had seen the man who wore a sign at the entrance the day before, and he was then wearing a sign. Definis did not read the sign on June 23, but she testified that she believed that it was the same as a sign that she had seen the man wearing the day before. Definis testified that the sign that she had seen the man wearing the day before was "a protest [against] Smucker's destruction of the area standard wages." When asked how big the sign was that she saw on June 23, Definis replied: "It was around his neck and it was pretty big, down to, I guess, his legs." When asked what she did at the end of the 5 seconds that the men had stood in her way, Definis testified: "Nothing. I just waited for them to move over and I pulled into the garage." On cross-examination, Definis admitted that, following that morning of June 23, she has not seen any pickets at the garage entrance. Neither the General Counsel nor the Charging Party presented any other evidence in support of the allegation that the Respondent picketed the neutral gate at the Society Hill Towers complex.

[10] The General Counsel also called Officer John Livewell who was dispatched to the scene several times. Livewell testified that he took certain actions based on citizens' complaints, but he did not describe the volume of the broadcasts that he witnessed, except to say that a broadcast on September 24 "seemed loud."

Dougherty flatly denied that the Respondent conducted any picketing of the neutral gate at Society Hill Towers on June 23. Dougherty testified that on June 22 his counsel advised him of the establishment of the separate gate system and that he should honor it. Dougherty further testified that on the morning of June 23, before any picketing of the complex began, he dispatched one individual to stand across the street from the garage entrance with a small "Observer" sign hanging around his neck; Dougherty testified that he subsequently saw that that individual did so. Dougherty denied that the individual wore a large picket sign such as that which Definis described.

c. Photographing and videotaping Smucker's employees at Society Hill Towers

Robert Majeski testified that he has the title of "general foreman" with Smucker, and Majeski testified that his duties at Smucker's Society Hill Towers project are "to oversee the drywall and carpentry aspect of the job and oversee all the Smucker employees on the job." Majeski testified that, in addition to himself, Smucker has employed from 2 to 4 employees at a time at the Society Hill Towers project. Majeski's title of general foreman and his testimony that he oversees other individuals employed by Smucker at the job would seem to indicate that Majeski could be considered a supervisor within Section 2(11) of the Act and a "person" under Section 8(b)(4)(ii)(B). The Respondent, however, makes no such contention. Moreover, there is no evidence to indicate the extent of Majeski's authorities when "overseeing" Smucker's operations at the Society Hill Towers project, and there is no evidence that Smucker had any subordinate "foremen" on the Society Hill Towers job (or anywhere else) that would tend to justify, in a business organizational sense, Majeski's title of "general" foreman. I therefore find and conclude that Majeski is an "individual" whom the Respondent is prohibited by Section 8(b)(4)(i)(B) from inducing to strike in order to have Society Hill Towers cease doing business with Smucker.

Majeski testified that on June 23, as he and two other employees of Smucker were approaching the Smucker gate at the complex, they were videotaped by someone who was wearing a picket sign. The picket followed them to the gate and continued filming them as they walked through the loading-dock area and ascended a stairway that led to the level of the complex's condominium areas. (The condominiums sit on a small hill, and the loading-dock area is at the foot of that hill.) When the Smucker employees reached the level of the condominiums and approached the entrance to one of them, they found Dougherty standing there with a still camera. Dougherty took some pictures of the employees; Majeski testified: "I was a little annoyed from the whole videotape situation, so when I saw this still camera, I kind of put my hand up to block the camera as I walked by, and [Dougherty] said, 'Got you, Bud.'" The other 2 Smucker employees went into the condominium to go to work, but Majeski turned and went to the complex's office to complain about the Respondent's videotaping and photographing activity. When Majeski left the complex's office and entered the courtyard, Dougherty was there and took more pictures of Majeski.

Majeski further testified that the Respondent continued its videotaping and photographing activity at the Smucker gate, "[f]rom that day on, pretty much every day for the next, probably, three weeks to a month." On July 7, Majeski came to work at the complex later than his usual starting time, and he approached the Smucker gate from a different direction. As he got nearer, he saw Dougherty standing across the street from the Smucker gate with another man who was wearing a picket sign. When Dougherty and the picket saw Majeski approaching, a footrace for the gate began. Majeski won. After he entered the gate, Majeski looked back at Dougherty and the picket and smiled. Dougherty took some still photographs and said: "Keep smiling, Bud."

Dougherty (the Respondent's only witness) did not deny this testimony by Majeski. Dougherty testified that the Respondent took the photographs and videotapes at the Smucker gate in order to gather evidence to rebut any contention that it had blocked ingress or egress at that gate. Dougherty further testified that the Respondent took videotapes inside the complex because Society Hill Towers was videotaping the Respondent's agents, both with their security-system cameras and with a camera that, on at least one occasion, he saw in a window of the complex. Dougherty further testified that the Respondent did its photographing and videotaping also because the City's Civil Affairs Division was videotaping its agents at the same time, "and we were just backing our situation up to make sure that we were doing everything in a legal standpoint, and videotaping them back again." The General Counsel subpoenaed all photographs and videotapes that the Respondent may have taken at the Society Hill Towers complex, but none were produced. Dougherty testified that the still photos were on one roll, and they "didn't even come out." Dougherty testified that there was only one videotape, with only a few seconds being taped each day, and: "Normally I would hold onto that tape and the camera. But in this particular case what happened was someone else needed the camera and I forgot to take the tape out, and they taped over it."

2. The Respondent's conduct at The Versailles

Davidson testified that, on 6 different occasions from July 7 through 16, while Nytech's work was in progress at The Versailles, he heard amplified broadcasts that the Respondent conducted from a sidewalk across the street. The message of the broadcasts was the same as part of a handbill that the Respondent also distributed to passers-by, *to wit:*

> Attention. Be careful. The Versailles Terrace at [address] employs Nytech, a contractor from New York, who has a record of unsafe and careless working habits by dropping materials on people. Could you be their next victim? Express you concerns to Peter Quack-Quack of the Carlisle Construction Group at [telephone number]. Metropolitan Regional Council Affiliate AFL–CIO.

Although not mentioned in the recorded message, a part of the handbill that the Respondent simultaneously distributed was a photocopy of an undated newspaper article that indicated that glass had fallen to a street during work by Nytech in Manhattan, injuring at least one person. (Davidson testified that Peter

Quackenbush is an executive of Carlisle Construction, the company that owns The Versailles; apparently Quackenbush was the "Peter Quack-Quack" to whom the Respondent's broadcasted message and handbill referred.)

The message that the Respondent broadcasted at The Versailles had been recorded on an audiotape loop, and it was repeated continually. Davidson testified that he heard the Respondent's broadcast between 7:30 and 8 a.m. on July 15 from his second floor office at The Versailles and:

> Well, it was loud enough to hear very clearly with all of the windows closed. I didn't have a radio on or anything, but if I did, it probably would have distorted my ability to hear that.

Davidson testified that at least 24 tenants and neighbors complained to him about the volume of the Respondent's broadcasts and asked him to do something about it. Davidson testified that he called the Air Management Division on 3 or 4 occasions; the loud broadcasts ceased after that authority issued a citation to the Respondent on July 16. Terrill testified that he issued the July 16 noise-pollution citation to the Respondent. Terrill testified that he was able to avoid being spotted by the Respondent's lookouts, and able to get readings on his sound-monitoring equipment that day, by coming to The Versailles and stationing himself in Davidson's office well before the Respondent began broadcasting. (The Respondent is also in the process of appealing Terrill's July 16 citation.)

Valerie Costanzo, who lives in a seventh floor apartment at The Versailles, testified that, during every morning, and during one evening, of a 2-week period in July she heard the Respondent's broadcasts inside her apartment. The morning broadcasts would begin about 7 a.m. and last for about an hour. The one evening broadcast began around 7:30 p.m., and it also lasted for about an hour. When asked to describe the sound level in her apartment, Costanzo replied, "[L]ike the loudest the television could go inside your apartment." Costanzo testified that she prefers to do without air conditioning, but, even during cooler mornings that the Respondent was broadcasting, she would close her windows and turn on the air conditioning in an attempt to escape some of the sound. Costanzo also testified that on some occasions the volume of the morning broadcasts were loud enough to awaken her.

C. Analysis and Conclusions

The complaint alleges that the Respondent violated Section 8(b)(1)(A) by photographing and videotaping Smucker's employees. The Respondent contends that its videotapes and photographs were taken in order to defend against potential unfair labor practice charges. The General Counsel subpoenaed the photographs and videotapes, but Dougherty claimed that the photographs "didn't even come out" and that one of his associates videotaped over the videotape of the Smucker employees. What happened to the videotape and the photographs is important, but not as an evidentiary matter; Dougherty admits (or, at least, does not deny) that the videotapes and photographs would have shown what the General Counsel's witnesses described. What happened to the videotape and the photographs is important because it shows the Respondent's motivation for its taking of the photographs and videotapes.

I do not believe Dougherty's testimony that the still photographs that he took of the Smucker employees at the Society Hill Towers complex "didn't even come out." Dougherty did not describe any efforts that he took to get the pictures developed, and I do not believe that he made any. I believe that Dougherty simply discarded the film because he had no legitimate purpose in taking the pictures in the first place. I do believe that Dougherty allowed the videotape of Smucker's employees to be taped over, but his doing so was essentially an act of discarding it, just as he discarded the still-camera film. I believe that Dougherty discarded the videotape for the same reason that he discarded the photograph film; he had no legitimate reason for taking the videotape in the first place. That is, Dougherty's discarding the videotape and the still-photograph film belies any contention that he did the photographing, or ordered the videotaping, to defend the Respondent against potential unfair labor practice charges.

The Respondent's lack of legitimate purpose creates an obvious suspicion that it photographed and videotaped the Smucker employees only to harass them. Nevertheless, I do not believe that by such conduct the Respondent violated Section 8(b)(1)(A). The General Counsel and the Charging Party Society Hill Towers contend that the Respondent's video and still photography would have tended to restrain or coerce Smucker's employees within the meaning of Section 8(b)(1)(A), but they do not say how. In his testimony, Majeski did not relate in any regard that he was, or could have been, restrained or coerced in the exercise of his Section 7 rights, which is what Section 8(b)(1)(A) requires. Nor do the General Counsel or the Charging Party argue how Dougherty's comments to Majeski of "Got you, Bud," and "Keep smiling" could reasonably have restrained or coerced Majeski. The cases that the General Counsel and the Charging Party cite as authority for the proposition that the Respondent's picture-taking violated the act are readily distinguishable; some are representation cases in which the Board found that picture-taking disturbed the laboratory conditions required for Board elections, and the others involved contexts of actual or threatened violence. This is not a representation case, and there is no hint of violence toward the Smucker employees in any of the Respondent's conduct. Finally, the Board has never held that picture-taking of employees who cross a picket line is a *per se* violation of the Act, which essentially is the holding that the General Counsel seeks here. Lacking such authority, and there being no other possible element of restraint or coercion being present, I shall recommend dismissal of the 8(b)(1)(A) allegations of the complaint.

The complaint further alleges that the Respondent violated Section 8(b)(4)(i) and (ii)(B) by picketing the neutral gate at Society Hill Towers on June 23. I credit Definis' testimony that for "about 5 seconds" on July 23, two men, one wearing a picket sign, stood before her automobile as she tried to enter the neutral gate at the complex's underground parking garage. I further credit Definis' testimony that the individual whom Definis saw wearing a picket sign on June 23 was the same individual whom she had seen picketing for the Respondent at that entrance during the day before. I further believe, and find, that the picket sign that the individual was wearing on June 23 was the same that he wore at the entrance on June 22. The Respon-

dent certainly knew who was carrying its picket sign at the underground parking garage entrance on June 22; if that person was carrying a different sign on June 23 the Respondent assuredly would have produced him to so testify. Nevertheless, assuming that the Respondent's June 23 (five-second) picketing of the neutral gate violated Section 8(b)(4)(i) and (ii)(B), the conduct never recurred. Just as an isolated use of a neutral gate by the primary employer does not excuse repeated picketing of that gate by a labor organization,[11] a brief, isolated, act of picketing of a neutral gate, especially when that gate had just been established, should not be held to constitute a violation of Section 8(b)(4)(i) and (ii)(B) that requires a Board remedy.[12] I shall therefore also recommend dismissal of this allegation of the complaint.[13]

I do, however, find that the Respondent violated Section 8(b)(4) and (ii)(B) by its repeated broadcasts at excessive volume levels at the Society Hill Towers complex and at The Versailles.

It cannot be argued that, no matter how loud its broadcasts were conducted, no violation of the Act can be found because the broadcasts were mere speech and thereby protected by the First Amendment. If the Respondent could conduct its broadcasts at any volume it chose, then people in their homes, and even in their businesses, are vulnerable to life-altering disruptions as the technology of portable high-volume sound reproduction evolves.[14] Fortunately for the peace and dignity of the country, and for the livability of our homes, this is not the case. As the Supreme Court stated in *Kovacs v. Cooper*, 336 U.S. 77, 86–87 (1949), where there was in issue the constitutional validity of a local ordinance that forbade the use of sound trucks on city streets if such devices emit "loud and raucous" noises:

> While this Court, in enforcing the broad protection the Constitution gives the dissemination of ideas, has invalidated an ordinance forbidding a distributor of pamphlets or handbills from summoning householders to their doors to receive the distributor's writings, this was on the ground that the home owner could protect himself from such intrusion by an appropriate sign "that he is unwilling to be disturbed." The Court never intimated that the visitor could insert a foot in the door and insist on a hearing. *Martin v. City of Struthers*, 319 U.S. 141. We do not think that the *Struthers* case requires us to expand this interdiction of legislation to include ordinance against obtaining an audience for the broadcaster's ideas by way of sound trucks with loud and raucous noises on city streets. The unwilling listener is not like the passer-by who may be offered a pamphlet in the street but cannot be made to take it. [Footnoted citation of *Schneider v. State*, 398 U.S. 146, 162.] In his home or on the street he is practically helpless to escape this interference with his privacy by loud speakers except through the protection of the municipality.

The Court in *Kovacs* specifically noted that there is no significant curtailment of free speech by a prohibition of loud and raucous noises where there is no attendant interdiction of dissemination by other means such as handbills (or "dodgers," as the Court employed the term at 336 U.S. 89). In this case, both at the Society Hill Towers complex and at The Versailles, the Respondent freely distributed handbills as it conducted its broadcasts, and the Respondent makes no argument that such distributions were ineffective to communicate with those who would *voluntarily* entertain the Respondent's message.

There being no constitutional impediment to this action, the next issue is whether the Respondent's conduct of amplified broadcasts violated Section 8(b)(4)(ii)(B). Dougherty did not deny that he threatened Davidson at The Versailles that: "he knew we had a project going there and that we weren't using his men, and he said that if we didn't use his men there, that he would have 100 of his men show up at the job and there might be trouble." I, of course, find and conclude that this was a blatant threat in violation of Section 8(b)(4)(ii)(B). The Respondent's secondary, prohibited, objective was also displayed in Dougherty's statement to Sherman that Society Hill Towers was "destroying area wages by employing nonunion employees" and that she should "have union people working there and that there could possibly be some problems in the future." The secondary objectives of the Respondent were further displayed in its handbills. At Society Hill Towers, the Respondent's handbill stated that it was "an appeal" to the public to get it to use its influence to get Sherman to stop using Smucker as a building contractor. Similarly, the handbill that was used at The Versailles was premised on the fact that the project "employs Nytech." The prohibited objectives having been clearly established, the next issue is whether the Respondent's use of the sound systems at Society Hill Towers and The Versailles constitutes a threat, restraint or coercion within Section 8(b)(4)(ii)(B). The first issue in that regard is whether the Respondent conducted its broadcasts at excessive volume levels.

I will not rely on the four citations (three at Society Hill Towers and one at The Versailles) that the Air Management Division issued to the Respondent for noise pollution. Those citations have been appealed by the Respondent, and there is therefore no final adjudication of the issues under the Philadelphia ordinances. Nevertheless, there is other evidence that is sufficient to decide whether the broadcasts were conducted at excessive volume levels and whether they therefore constituted coercive conduct that is prohibited by Section 8(b)(4)(ii)(B).[15]

By Respondent's regularly maintaining lookout systems while it was conducting amplified broadcasts at Society Hill

[11] See, for example: *Electrical Workers IBEW Local 369 (C.T. Love & Assoc.)*, 216 NLRB 141 (1975), and *Operating Engineers Local 18 (Dodge-Ireland)*, 236 NLRB 199 (1978).

[12] In *Retail Clerks Local 324. (Barker Bros. Corp.)*, 138 NLRB 478, 486–492 (1962), affd. 328 F.2d 431 (9th Cir. 1963), it was held that a union had not violated Sec. 8(b)(7)(C) where, during a 12-week period of picketing 18 stores, there "were only 3 delivery stoppages, 2 work delays and several delivery delays."

[13] The cases cited by the General Counsel and the Charging Party on this point involve repeated picketing at neutral gates.

[14] One can easily imagine the devastating effect on a neighborhood that would result from unrestrained amplified broadcasting by two labor organizations that are engaged in a jurisdictional dispute.

[15] Without citing any authority for the proposition, the Respondent argues that consideration of the volume of its broadcasts is "solely within the City's police powers." Of course, conduct can violate Federal, as well as local, law. Nor is the Board required to wait until final local or state review before it can act.

Towers and The Versailles, the Respondent acknowledged that those broadcasts were conducted at excessive volume levels. There would have been no point in the Respondent's maintaining those signaling systems except to avoid definitive assessment of the volume of its broadcasts by the Air Management Division. Just as flight, or cover-up, can indicate an admission of knowing misconduct, the Respondent's employment of signaling systems, and its turning down the volume as the marked vehicles of the Air Management Division approached, constitute probative evidence that it was fully aware that its broadcasts were being conducted at excessive volume levels.

And there is no doubt that on several occasions the Respondent was at Society Hill Towers to create noise rather than to inform the public of anything. The Respondent often operated 2 systems at once without synchronizing them. Thus, the message of both systems would have been, and were, garbled to anyone who was subjected to the process (unless he stood very close to one or the other).

Regarding the Respondent's operations of one or more sound systems at the Society Hill Towers complex before the October 14 10(l) injunction was issued, I fully credit the testimony of Sherman that some of the Respondent's broadcasts sounded like a radio or television at full volume in her sixth floor condominium, that the broadcasts were as loud as the condominium's fire alarm, and that she witnessed the broadcasting's setting off a car alarm. I fully credit the testimony of Smith that in his 18th floor condominium the volume of the broadcasts sounded like a radio at full volume, that the sound made it difficult to concentrate on anything else or talk on the telephone and that the morning broadcasts on weekends awakened him. I fully credit the testimony of Feldman that the morning broadcasts awakened her and her husband in their 25th story condominium and that when she appealed to the sound system operators they would turn it down only momentarily. I fully credit the testimony of Timberlake that he and his family were awakened in their 31st floor condominium by the morning broadcasts on weekends and that he and his wife were driven from a swimming pool area by a broadcast on at least one occasion. I fully credit the testimony of Adams that the broadcasts were loud enough in her home across the street from the complex to shake the pictures on the walls and that she asked Dougherty to turn down the volume but he only did so an imperceptible amount. As well as crediting Terrill's testimony about the Respondent's use of a lookout system, I fully credit his testimony that he could sometimes hear the Respondent's broadcasts from as much as five blocks away. I fully credit the testimonies of Lt. McLaughlin and Officer Gleason that they could hear the Respondent's broadcasts one or two blocks away from the Society Hill Towers and that the volume of the broadcasts would interfere with normal conversations in the area. I further fully credit Gleason's testimony that individuals had to raise their voices to hear each other when in the area of the broadcasts, that sometimes when he asked Dougherty to lower the volume Dougherty would do so only imperceptibly, and that when Dougherty operated multiple sound systems without their being synchronized Dougherty refused to lower the volume. I fully credit Officer West's testimony to the same effect.

Regarding the Respondent's operations of a sound system at The Versailles before the 10(l) injunction was issued, I fully credit Davidson's testimony that the volume of the broadcasts were loud enough to distort any radio broadcast inside his second floor office. I further fully credit Costanzo's testimony that in her seventh floor apartment the volume of the Respondent's broadcasts seemed "[L]ike the loudest the television could go inside your apartment."

All of this testimony leads me to find that, as alleged, the Respondent conducted its amplified broadcasts at the Society Hill Towers complex and at The Versailles at excessive volume levels. The secondary objective of the broadcasts having previously been demonstrated, the next issue is whether the Respondent's broadcasting at excessive volume levels constituted threats, restraint or coercion within Section 8(b)(4)(ii).

Although secondary boycott cases usually occur in contexts of traditional picketing, coercion under Section 8(b)(4)(ii) is not limited to picketing. In *Sheet Metal Workers Local 91 (Schebler Co.)*, 294 NLRB 766, 775 (1989), enfd. in relevant part 905 F.2d 417 (D.C. Cir. 1990), the Board held that a labor organization's denying economic relief to an employer who had refused to enter a hot-cargo agreement, while simultaneously granting relief to other employers who had signed such agreements, constituted "coercion" within Section 8(b)(4)(ii)(A). In so doing, the Board expressly approved of an earlier-stated definition of "coercion" as "non-judicial acts of a compelling or restraining nature, applied by way of concerted self-help consisting of a strike, picketing, or other economic retaliation or pressure in a background of a labor dispute." In *Carpenters Local 742 (J. L. Simmons Co.)*, 237 NLRB 564, 565–556 (1978), the Board found that a union violated Section 8(b)(4)(ii)(B) by making demands, unaccompanied by striking or picketing or any other such conduct, that a contractor pay his employees premium pay for hanging precut doors which were specified by the contractor's agreement with the purchaser (because such proposal was actually an effort to cause the contractor, a neutral, to have the purchaser use other than precut doors).

More specifically, secondary conduct which interferes with the peaceful use of private facilities has been found to violate Section 8(b)(4)(ii)(B), even without the factor of picketing. In *Pye v. Teamsters Local 122*, 61 F.3d 1013, 1022–1024 (1st Cir. 1995), the First Circuit agreed there was reasonable cause to believe that a union's affinity shopping (crowding small retail stores with individuals who used large bills to purchase small items) was coercion in violation of Section 8(b)(4)and (ii)(B). The court stated at 1024:

> We have little difficulty in finding that the Union's group shopping plausibly could be deemed a coercion-based secondary boycott under Section 8(b)(4)(ii)(B) and, hence, that there is adequate legal substance behind the issuance of the injunction. The language of Section 8(b)(4)(ii) "is pragmatic in its application, looking to the coercive nature of the conduct, not to the label which it bears." [Citation and internal quotation marks are omitted.] Although group shopping, as conducted by the Union in this case, is a new twist and may not fit the traditional conception of a secondary boycott, see, e.g.,

> *Denver Building & Construction. Trades*, 341 U.S. at 687, 671 S.Ct. at 950–951 (describing a classic secondary boycott), this qualification mostly serves to earn the Union high marks for ingenuity. Coercion under Section 8(b)(4) and (ii)(B) is a broad concept, and the NLRB has not hesitated to include varied forms of economic pressure within the conceptual ambit.

"High marks for ingenuity," of course, is not what the Respondent sought here, any more than the respondent sought such in Pye v. Teamsters. What the Respondent sought here was Society Hill Towers' termination of business with Smucker and The Versailles' termination of business with Nytech, as the Respondent's handbills and Dougherty's threats plainly disclosed.

Even more specifically, the Board has found violations of Section 8(b)(4)(ii)(B) where unions' secondary activities, short of picketing, have interfered with the use of private facilities by patrons and tenants of neutrals. In *Mine Workers (New Beckley Mining)*, 304 NLRB 71, 72–73 (1991), enfd. 977 F.2d 1470 (D.C. Cir. 1992), a union had a crowd of 50 to 140 members come at 4 a.m. to a motel where strike replacements were being quartered and yell "How you doing, scabs?" and "Why don't you go home?" The Board found that, even in the absence of placards or picket signs, the union's activity unlawfully coerced the (neutral) motel operator to cease renting rooms for the replacements. The Board based its holding on the crowd's large size, the yelled messages, and "by the timing of the crowd's arrival at the inn in the predawn when the latter's guests likely were sleeping and the general public was not astir." In *Service Employees Local 525 (General Maintenance Co.)*, 329 NLRB 638, 639 fn. 12, 679–680, 681–682 (1999), a union was found to have engaged in various acts of coercion against neutral employers, including having its members hurl trash bags filled with shredded papers into the lobby of a commercial building and having its members demonstrate at the private residence of a principal of a neutral. In finding a violation with regard to the trash bags incidents, the Board noted that the union staged these incidents with "the certain knowledge that they would inconvenience tenants and others entitled to the peaceable use of the buildings." Id. at 680. In *Service Employees Local 87 (Trinity Maintenance)*, 312 NLRB 715, 746–748 (1993), enfd. 103 F.3d 139 (9th Cir. 1996), a building owner hired a nonunion contractor. A union conducted mass gatherings and engaged in excessive noise activity (by, inter alia, the use of bullhorns) directed at tenants of a building in an effort to get the (neutral) building owner to cease doing business with the contractor. The Board found that the union's harassment of the tenants violated Section 8(b)(4)(ii)(B). Finally, in *Service Employees Local 399 (William J. Burns Agency)*, 136 NLRB 431, 436–437 (1962), the Board found that a union violated Section 8(b)(4)(ii)(B) because it engaged in a mass gathering at an entrance to an exhibits hall whose owner had engaged a contractor who did not employ union members. No picketing was conducted, and the Board found that the gathering slowed, but did not actually block, patrons from entering the exhibits hall. Nevertheless, the Board found that the gatherings "constituted a harassment and a restraint upon those attending or seeking to attend the exhibition." The Board held that such harassment was a violation because its purpose was to "threaten, coerce, or restrain" the (neutral) exhibits hall's owner to cease doing business with the contractor. Those seeking to enjoy in peace their living spaces at Society Hill Towers and at The Versailles were harassed by the Respondent's broadcasting at least as much as the store owners and patrons in *Pye v. Teamsters*, the exhibits-hall patrons in *Burns,* the motel patrons in *New Beckley Mining*, and the building tenants in *Trinity Maintenance* and *General Maintenance Service*. Indeed, those tenants and patrons were harassed only momentarily, but the residents of Society Hill Towers and The Versailles were harassed by the Respondent's broadcasts at excessive volume levels day, after day, after day.

That is, the Board has seen before, and has condemned before, nonpicketing conduct that constituted coercion within Section 8(b)(4)(ii)(B); specifically, the Board has seen, and condemned, non-picketing harassment of tenants of neutral buildings who are caught up in disputes not of their own making. The Board will likewise condemn as violative the Respondent's excessive-volume broadcasts at Society Hill Towers and The Versailles unless they were, as argued by the Respondent, excused by the publicity proviso of Section 8(b)(4) or the free speech guarantee of Section 8(c).

In *DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 569 (1988), a union handbilled a shopping center in an attempt to cause the owner to cease doing business with a nonunion remodeling contractor. The Court held that the publicity proviso of Section 8(b)(4) protected such handbilling because it did not also involve coercive conduct such as "violence, picketing or patrolling." Id. 578. The Respondent here argues that its amplified broadcasting was the equivalent of the handbilling in *DeBartolo* because the texts of its broadcasts were essentially the same as that which had been printed on its accompanying handbills. *DeBartolo*, however, involved *peaceful* handbilling without any ancillary coercive conduct such as the high-volume broadcasting that the Respondent conducted in this case.[16] Such coercive conduct by the Respondent had the obvious object of causing so much discomfort that the principals of Society Hill Towers and The Versailles, who would be besieged with complaints of tenants (and others), would cease doing business with Smucker and Nytech, respectively. As this broadcasting at excessive volume levels was coercive conduct, it was not protected by the publicity proviso of Section 8(b)(4).[17]

Finally, the Respondent argues that its broadcasts, even if conducted at excessive volume levels, constituted speech that was protected by Section 8(c) because it contained "no threat of reprisal or force." Logically, however, if threats of force or reprisals are not protected by Section 8(c), a fortiori, the actual taking of reprisals and the actual exertions of force are not protected by that section. The Respondent's broadcasting at Society Hill Towers was a reprisal for Sherman's not bowing to Dougherty's demand that Charg-

[16] Indeed, the first sentence of *DeBartolo* is: "This case centers around the respondent union's *peaceful* handbilling of the businesses operating in a shopping mall in Tampa, Florida, owned by petitioner, the Edward J. DeBartolo Corporation (DeBartolo)." (Emphasis added.)

[17] In fn. 4 of *General Maintenance Service Co.*, supra, the Board noted that the union's conduct in *DeBartolo* was "merely expressive conduct" and not "a combination of conduct and communication more likely to be found coercive under the Act."

ing Party Society Hill Towers cease doing business with Smucker. Likewise, the Respondent's broadcasting at The Versailles was a reprisal for Davidson's not bowing to Dougherty's demand that The Versailles cease doing business with Nytech. The broadcasts also constituted force that is not protected by Section 8(c). Anyone who has flinched when someone yells in his ear has done so because he has been subjected to force; to wit: the force of sound waves that have reached his tympanums. If in the context of a labor dispute the force of amplified sound rises to a level that reasonably causes a individual who is neutral to that dispute to substantially alter his conduct against his will, the exertion of that force is not protected by Section 8(c). In this case, the tenants and neighbors of Society Hill Towers and The Versailles who appeared as witnesses were reasonably and foreseeably awakened from their sleep, forced to conduct their business in ways other than that which they would have preferred, forced to complain to managers of their buildings, forced to complain to the police and noise-pollution authorities, and generally discomforted and distracted from their ordinary and peaceful pursuits, all because of the Respondent's broadcasting that was conducted at excessive volume levels. The Respondent's broadcasts at excessive volume levels at Society Hill Towers and The Versailles were therefore not protected by Section 8(c).

I accordingly find and conclude that, by conducting amplified broadcasts at excessive volume levels at Society Hill Towers from June 15 through October 7, and by conducting amplified broadcasts at excessive volume levels at The Versailles from July 7 through 16, with the object of forcing or requiring Society Hill Towers to cease doing business with Smucker, and with the object of forcing or requiring The Versailles to cease doing business with Nytech, the Respondent has violated Section 8(b)(4)and (ii)(B) of the Act.

THE REMEDY

On brief, the General Counsel asks for no more than a general cease and desist order and an order that the Respondent post the usual notice to members. Charging Party Society Hill Towers, however, requests an order that the Respondent cease using its sound systems altogether; alternatively, the Charging Party asks that the Respondent be ordered to cease broadcasting its messages at any time of day at "excessive levels," as defined by a reasonable person standard, without reference to any specific requirement of the Philadelphia noise ordinances. The Charging Party's positions are premised on representations that, even after the 10(l) injunction was issued on October 14, the Respondent "is still" using spotters, and "continues" to turn down the volume when local authorities approach, and "continues" to violate the City noise-pollution orders. These representations are not consistent with the testimony of the General Counsel's witnesses who testified that, since October 14, the broadcasts at Society Hill Towers have been audible in their condominiums, but not intrusive. Moreover, if the Respondent has violated the injunction after the hearing before me, the proper course is to address the forum that issued that injunction, the District Court.

According to the record before me, the orders issued by Judge Fullam have had one cardinal virtue; they have worked to preserve the peace while Smucker is present at Society Hill Towers and the matter is being considered by the Board. (Again, Nytech's work at The Versailles has been completed, but Smucker's work at Society Hill Towers will not be completed until April 2000.) I shall therefore model my recommended order on Judge Fullam's injunction.

[Recommended Order omitted from publication.]